Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions of the Telecommunications	)	
Act of 1996	)	

JOINT REPLY

The National Exchange Carrier Association, Inc., National Rural Telecom Association, National Telephone Cooperative Association, and Organization for the Promotion and Advancement of Small Telecommunications Companies (jointly, The Associations) submit this reply to comments filed in response to the Commission's Fourth Further Notice of Proposed Rulemaking (FNPRM) in the above captioned matter.[1]

The comments present compelling arguments, as shown below, that the Commission not only is authorized, but is obligated to assure that unbundled network elements (UNEs) may not be used to evade access charges by carriers that do not offer local service to customers.

I. Failure To Impose Reasonable Restrictions On The Availability Or Use Of UNEs Will Harm Incumbent Local Exchange Carriers And Their Customers.

Comments in this proceeding demonstrate clearly that permitting interexchange carriers (IXCs) to use UNEs as a substitute for special access, in circumstances where the requesting carrier does not provide local service to end users, will cause significant harm to incumbent local exchange carriers (ILECs) and their customers. As GTE explains, re-pricing special access service at total element long run incremental costing (TELRIC) rates would cause substantial

[1] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, FCC 99-238 (rel. Nov. 5, 1999)(FNPRM).

revenue losses, with up to $6 billion dollars at risk industry-wide.[2] If ILECs are forced to permit IXCs to substitute UNEs for switched access services, the revenue losses would be significantly greater. Even if this policy were limited to special access, reductions in special access rates to TELRIC would also affect switched access revenues anyway. As the "cross-over" point between switched and special access services is lowered, more switched access customers would migrate to special.[3]

Further, as SBC explains, permitting IXCs that do not provide local service to a customer to substitute UNEs for special access services

> would do *nothing* to promote the interests of most consumers. . . . A decision to allow UNEs to displace special access and private line services would . . . result in nothing more than a massive diversion of revenues from ILECs and facilities-based CLECs to large businesses and IXCs. . . .[4]

IXC commenters in this proceeding attempt to argue that reductions in special access revenues would do no harm to universal service because special access rates are "above costs" (meaning, above TELRIC costs).[5] But, even if special access rates do not contain specifically-identified universal service subsidies, there is no question that the revenues derived from these services help finance basic service rates via recovery of overhead amounts that are excluded from TELRIC prices. Thus, if special access services are re-priced at TELRIC, the consumers who continue to purchase basic telephone service will be left "holding the bag."[6] And, these adverse

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[2] *See* GTE at 3. This figure includes both interstate and intrastate special access revenues.

[3] *Id.* at 3.

[4] *See* SBC at 15.

[5] *See*, *e.g.*, AT&T at 8, MCI at 9.

[6] *See*, *e.g.*, SBC at 15; US West at 17-18; USTA at 12.

effects would be increased as carriers migrate from switched access to UNEs.[7]

Commenters also point out that, in addition to harming ILECs and their customers, a decision to permit unbridled substitution of UNEs for special access would decimate the burgeoning competitive market in special access services, as competitive LECs are forced to meet TELRIC prices imposed by regulators or (more likely) go out of business entirely. Certainly, as SBC points out, if the Commission requires LECs to provide special access/private line circuits at UNE rates, competitive LEC deployment of alternative facilities will "grind to a screeching halt."[8]

In this regard, failure to permit reasonable use restrictions on UNEs would represent an ironic about-face for the Commission. For years, the Commission has acted to promote a competitive marketplace in special access services, presumably on the theory that the market can do a better job establishing prices than regulation.[9] The Commission has, for example, carefully regulated the degree to which ILECs are permitted to offer discounted special access rates, out of

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[7] *See, e.g.*, SBC at 16; USTA at 12-13; US West at 19; BellSouth at 17; Associations at 3-4.

[8] *See* SBC at 14.

[9] *See, e.g.*, Access Charge Reform *et al*, *First Report and Order*, CC Docket 96-262, 12 FCC Rcd 15982, 16099 (1997) ("Our access charge ... rules are designed to ensure that access charges remain within the 'zone of reasonableness' defining rates that are 'just and reasonable', and our market-based approach will also be designed to implement this statutory requirement." ... "(O)ur market-based approach is an eminently reasonable method for pursuing our goal of promoting competition and ensuring the economically efficient pricing of interstate access services."); Access Charge Reform CC Docket 96-262, Price Cap Performance Review for Local Exchange Carriers, CC Docket 94-1, Transport Rate Structure and Pricing, CC Docket 91-213, Usage of the Public Switched Network by Information Service and Internet Access Providers, CC Docket 96-263, *Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry*, 11 FCC Rcd 21354, 21418 (1996) ("Our overriding goal in this proceeding is to adopt revisions to our access charge rules that will foster competition for these services and eventually enable marketplace forces to eliminate the need for price regulation of these services.")

a concern that deep zone discounts could stifle competition.[10] Here, mandatory substitution of TELRIC-priced UNEs for existing competitive special access rates would, of course, accomplish the opposite result. As noted by SBC, a Commission decision replacing competitive special access market prices with deeply discounted TELRIC rates, set by regulatory fiat, would "represent a departure from 16 years of Commission policy and a betrayal of the CLECs who relied on that policy as they invested in competitive fiber networks."[11]

The Commission was correct when it found, in the 1996 *Local Competition Order*, that permitting IXCs to replace access services with UNEs would be "undesirable as a matter of both economics and policy."[12] As the Associations and various LEC commenters showed, if the Commission permits IXCs to substitute TELRIC-based UNEs for special access, the Commission's separations and access charge rules would soon collapse, and current efforts to reform those rules in a coherent fashion would be rendered moot. Further, to the extent that incumbent LEC costs not recovered via TELRIC-based UNE prices are reallocated elsewhere, as indeed they must under the Commission's rules, prices for end users would rise in unpredictable ways, threatening universal service. It is simply mind-boggling that the Commission would even *consider* allowing these effects to occur.

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[10] *See, e.g.*, Access Charge Reform, CC Docket 96-262, Price Cap Performance Review for Local Exchange Carriers, CC Docket 94-1, Interexchange Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers, CCB/CPD File No. 98-63, Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA, CC Docket 98-157, *Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 14221, 14254 (1999).

[11] *See* SBC at 15.

[12] *See* Implementation of the Local Competition Provision in the Telecommunications Act of 1996, CC Docket No. 96-98, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket 95-185, *First Report and Order*, 11 FCC Rcd 15499 at ¶719 (1996).

For the reasons stated by the Associations, BellSouth, GTE, SBC, US West and USTA, the Commission should maintain the prohibition on unrestrained substitution of UNEs for access services, at a minimum until such time that it resolves outstanding cost recovery issues in its proceedings on separations, universal service and access charge reform.

II. The Commission Has Ample Legal Authority To Impose Reasonable Restrictions On The Availability Or Use Of UNEs In These Circumstances.

As shown above, maintaining existing prohibitions on the substitution of UNEs for access services is clearly justified and in the public interest. IXC commenters in this proceeding claim, however, that the narrow language of section 251(c)(3) somehow renders the Commission powerless in this regard. According to AT&T and MCI Worldcom, for example, section 251(c)(3), which was clearly intended to foster competition in the *local* telecommunications market, now provides an unbounded right for carriers to substitute UNEs for special access (and, by extension, switched access), regardless of resulting disruptions in the marketplace and in rates for consumers.[13]

This cannot be what Congress intended in enacting the local interconnection provisions of the Act. As several commenters point out, section 251(d)(2) of the Act requires the commission to conduct an analysis of whether a failure to provide a particular network element will impair requesting carriers' ability to provide services.[14] No analysis has been conducted

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[13] *See* AT&T at 4-5, MCI at 3-4.

[14] *See, e.g.*, GTE at 8-9 ("In the *UNE Remand Order*, the Commission interpreted the section 251(d)(2) 'impair' standard to mean that, 'taking into consideration the availability of alternative elements outside the incumbent's network ..."); BellSouth at 20 ("The special access loop and transport facilities used to provide special access services ... can not generally meet the unbundling standard set out in section 251(d)(2) ... [when] measured against 'the services the carrier seeks to offer'."); SBC at 7("Section 251(d)(2) by its very terms directs the Commission

with regard to the provision of special access services. And, given the robust state of competition in the special access marketplace,[15] it is highly questionable whether the "impairment" standard would be met.

But, even if ILECs are required to make UNEs available for purposes of providing special access services, section 251(c)(3) of the Act clearly empowers the Commission to establish *some* "just, reasonable and nondiscriminatory" conditions on the availability and/or use of UNEs. As the record in this proceeding demonstrates, a limited, focussed restriction intended to prevent rate arbitrage is "just and reasonable" within the meaning of section 251(c)(3).[16] GTE shows that the Commission itself repeatedly has reached this conclusion.[17]

The record is also clear that Congress intended in section 251(g) of the Act that existing access charge regulation be allowed to continue pending completion of Commission reform proceedings. Although IXC commenters assert that this section of the Act was primarily intended to serve as "protection" for IXCs rather than ILECs,[18] there can be no reasonable question that Congress' main purpose in enacting section 251(g) was to permit the Commission

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to consider whether lack of access to non-proprietary network elements would impair the ability of a telecommunications carrier requesting access to provide the '*services*' it seeks to offer". n. omitted, emphasis in original.)

[15] *See* USTA Comments, Attachment: *Special Access Fact Report* at 6-8.

[16] *See* BellSouth at 15, ((R)equiring carriers that use UNEs for access to serve local end users meets the "just, reasonable, and nondiscriminatory" test ...")

[17] *See* GTE at 14. ("Following the *Local Competition Order*, the Commission twice has unconditionally prohibited access arbitrage by IXCs that do not also provide local service to the end user customer.")

[18] *See*, *e.g.*, MCI at 6, Sprint at 8, AT&T at 6-7.

to preserve the *status quo* pending completion of reform proceedings.[19] IXC arguments regarding the "intended beneficiaries" of section 251(g) [20] completely miss this point.

Finally, as GTE point outs, permitting unrestricted price arbitrage between UNEs and access services would completely preclude any attempt by the Commission to develop rational approaches to access reform.[21] For example, the Commission is currently considering the merits of an access reform proposal advanced by several large LECs and IXCs.[22] If access charges are simply replaced by UNE prices, as the IXC commenters in this proceeding urge, current regulatory reform efforts would be left in disarray, and likely moot. Worse, resulting cost shifts and unpredictable price changes would have severe adverse effects on consumers and universal service. The Commission not only has authority to avoid such effects, it has the responsibility to assure that they do not occur.

III. Conclusion

The Commission has specific authority under section 251 of the Act and general authority under section 4(i) of the Act to impose reasonable availability and/or use restrictions on UNEs. The restrictions at issue here – designed to prevent wholesale disruption of existing separations, access charge, and universal service mechanisms – are clearly reasonable in light of the overall

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[19] *See* Telecommunications Act of 1996, H.R. Report 104-458, *Joint Explanatory Statement* at 117. ("The obligations and procedures prescribed in this section [251] do not apply to interconnection arrangements between local exchange carriers and telecommunications carriers under section 201 of the Communications Act for the purpose of providing interexchange service, and nothing in this section is intended to affect the Commission's access charge rules.")

[20] *See, e.g.*, MCI at 6, Sprint at 8, AT&T at 6-7.

[21] *See* GTE at 20.

[22] *See* Access Charge Reform, CC Docket 96-262, *Notice of Proposed Rulemaking*, FCC 99-235 (rel. Sep. 15, 1999).

intent of the Act and the Commission's regulatory scheme.

Further, the Act, along with the Administrative Procedures Act, imposes on the Commission a duty to regulate the telecommunications industry in an orderly fashion. The Commission, seemingly, is committed to conducting reviews of existing telecommunications regulatory programs in such a fashion, via its proceedings on separations, universal service, and access charge reforms. The Commission should not adopt the rash and irresponsible position urged by IXC commenters and large users in the proceeding, but should instead address the serious pricing and cost recovery issues highlighted in the proceeding in an orderly and considered fashion.

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